IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 27/06/2003

CORAM

THE HONOURABLE MR.JUSTICE V.KANAGARAJ

SECOND APPEAL NO.1711 OF 1991

1.Kaliappan (died)
2.K.Natarajan (died)
3.N.Ananthi
4.N.Kapila
5.N.Aditya (Minor) rep.by
her mother & natural guardian
third appellant ... Appellants

(Second appellant brought on record
as L.R. of the deceased sole appellant
by order of the Court dated 16.7.2002
made in C.M.P.No.17851 of 2001.)

(Appellants 3 to 5 are brought on
record as L.Rs. of the deceased
second appellant as per the order
of the Court dated 4.4.2003
made in C.M.P.No.4628 of 2003)

-Vs-

1.Venkatachalam
2.Chinnammal ... Respondents

Second Appeal preferred under Section 100 C.P.C. for the relief as
stated therein.

For appellants : Mr.S.Duraisamy

^For R.1 : Mr.K.Mohanram
For R.2 : No Appearance

:JUDGMENT
The above second appeal is directed against the judgment and
decree dated 30.9.1991 rendered in A.S.No.35 of 1990 by the Court of I
Additional Subordinate Judge, Coimbatore thereby setting aside the judgment
and decree dated 10.8.1989 rendered in O.S.No.878 of 1979 by the Court of I
Additional District Munsif, Coimbatore.

2. The deceased first appellant is the first defendant in the suit. The first respondent herein is the plaintiff and the second respondent, who is none other than the wife of the deceased first appellant is the second defendant in the suit.

3. For the sake of convenience and for easy reference, the parties are referred to as they are arrayed in the suit.

4. The suit was originally filed only against the deceased first appellant herein for specific performance of the agreement dated 29.9.1978 executed by him in favour of the plaintiff further directing the defendant to execute the sale deed in favour of the plaintiff, failing which the Court to execute the sale deed regarding the suit properties in favour of the plaintiff and consequently direct the defendant to deliver possession of the properties to the plaintiff and for costs.

5. The case of the plaintiff is that the suit property absolutely belongs to the first defendant; that on 20.9.1978, the first defendant executed an agreement in favour of the plaintiff to sell the same for a sum of Rs.5,000/= and on the same date, a sum of Rs.2,000/= was received by the first defendant as advance; that as per the sale deed, the first defendant has to execute the sale deed in favour of the plaintiff in a period of ten months, after receiving the balance sale consideration; that as the suit property is only a vacant site, after the agreement, the plaintiff spent about Rs.2,000/= to level the site and also to put necessary fence; that now since he is having sufficient funds to pay the balance sale consideration, the plaintiff approached the first defendant and requested him to execute the sale deed, but the defendant set-up his wife, Chellammal, to issue a notice stating that she has got right over the properties and that the properties should not be sold for which the plaintiff sent a reply; that the wife of the defendant is living with him and she is also aware of the agreement executed by the defendant; that after issuance of the said notice, even though the plaintiff approached the defendant and requested him to execute the sale deed, the defendant began to put up a construction in the said site and therefore, on 2.5.1979, the plaintiff lodged a complaint with the Peelamedu Police and when the police enquired both the plaintiff and the defendant, the defendant replied that he is not willing to execute the sale deed and therefore, Police directed both parties to seek remedies before a Court of law; that the wife of the defendant claims that the sale in favour of the defendant is a benami sale and hence the suit.

6. The first defendant filed a written statement thereby denying all the allegations of the plaint and further submitting that no doubt there was an agreement, but under that agreement, the price stipulated was Rs.8,000/= and the agreement mentioned in the plaint as one providing for sale of the property for Rs.5,000/= is false; that the property measures 4 cents and 148 square feet and the price of Rs.5,000/= mentioned in the plaint is far too low; that the price agreed upon and mentioned in the written agreement was Rs.8,000/= and not Rs.5,00 0/= and the suit has been filed obviously on a false agreement; that the plaintiff never approached this defendant for executing the sale deed; that the plaintiff was never ready to take the sale

deed by paying money as provided for in the agreement in which Rs.8,000/= was mentioned as the price; that the plaintiff has filed the suit suppressing the true written agreement and even as per the true written agreement, the plaintiff was never ready to perform his part of the contract; that the plaintiff did not show the agreement to the police even; that the defendant said that he would execute the sale deed if the plaintiff paid the balance of Rs.6,000/=, but since the plaintiff was not agreed to the said proposal, this defendant replied that she would not execute the sale deed after receiving Rs.3,000/= offered by the plaintiff. On such grounds, the first defendant would pray to dismiss the suit with costs.

7. The first defendant also filed an additional written statement thereby denying the execution of the document dated 20.9.1978 and further submitting that the plaintiff created the said document with the help of his friends and relatives with a view to make huge profits wrongfully; that even at the time of the alleged agreement, sites in the vicinity with the similar advantages were sold at Rs.5,000/= per cent and later on, the prices have shot-up and now one cent is sold in the vicinity at Rs.10,000/= ; that the property is situate just opposite to Nava India and in the industrial locality and hence one cent of land is easily wroth Rs.10,000/= at present; that the plaintiff has not come before the Court with clean hands; that his wife is still earning in the Mills and the suit property was purchased by both the defendant and his wife for a sum of rs.4,305/= and the sale consideration was paid by his wife from out of her savings from the monthly wages; that the property was purchased in the name of this defendant since he assured that he would not sell or squander; that the circumstances under which the property was purchased were well known to the plaintiff and with an evil design to clutch the property an agreement of sale is fabricated by the plaintiff; that the plaintiff was not given possession of the suit site; that the defendant, from the date of purchase of the property, is in possession of the same along with his wife; that the value given is ridiculously low and the value ought to have been Rs.40,000/=; that the wife of this defendant is a necessary party and the suit must fail for non-joinder of necessary parties. On such grounds, this defendant would pray to dismiss the suit with costs.

8. Since the defendant has taken the stand that the suit is bad for non-joinder of his wife, the plaintiff filed a petition in I.A.No.77 8 of 1981 to implead the wife of the defendant as the second defendant in the suit and on the same having been allowed by the trial Court, the wife of the defendant was brought on record as the second defendant and she also filed a written statement thereby submitting that the suit property is her absolute property; that she is working in Varadharaja Mills for the last about 25 years and has purchased the same with the savings earned in her income from the mill and from her other properties; that the suit property is in her possession from the date of its purchase; that the first defendant has no manner of right or interest in the property; that this defendant's son Natarajan is also claiming a share in the property and he has also filed a suit for partition; that the first defendant is in the habit of quarrelling with this defendant and used to live away from the family for months and taking advantage of the first defendant's weakness and squandering habit, the plaintiff fraudulently brought into existence the suit document with the help of his close relatives Veluswamy and Ramaswamy by means of forgery; that the first defendant did not

execute the sale agreement; that the alleged agreement is void ab initio; that in a suit for specific performance, the plaintiff ought to have clearly stated that he has been ever ready and willing to purchase from the inception of the document and this gross omission discloses that everything has been done in haste and under suspicious and fraudulent circumstances. On such allegations, this defendant would pray to dismiss the suit with costs.

9. Based on the above pleadings by parties, the trial Court would frame the following issues for determination:
1.Whether the plaintiff is entitled to the specific performance of agreement dated 20.9.1978?
2.Whether the plaintiff is entitled to delivery of possession as prayed for?
3.To what relief?
Thereupon, the trial Court would conduct a thorough trial wherein the plaintiff besides examining himself as P.W.1 would also examine three more witnesses as P.Ws.2 to 4 for oral evidence and would mark four documents as Exs.A.1 to A.4 for documentary evidence, Ex.A.1 dated 20.9.1978 is the sale agreement alleged to have been entered into in between the plaintiff and the first defendant, Ex.A.2 dated 28.4.1979 is the lawyer's notice issued by the second defendant to the plaintiff and the first defendant; Ex.A.3 dated 3.5.1979 is the copy of the reply notice sent by the plaintiff's advocate to the second defendant's advocate and Ex.A.4 dated 2.5.1979 is the notice sent by the police to the plaintiff and the first defendant. On the other hand, even though no documentary evidence was submitted on behalf of the defendant, the defendants would examine themselves as D.Ws.1 and 2 respectively.

10. The trial Court, in consideration of the evidence placed on record and having found the plaintiff not ready and willing to get the sale deed executed, has ultimately dismissed the suit. Aggrieved, the plaintiff preferred an appeal in A.S.No.35 of 1990 before the Court of I Additional Subordinate Judge, Coimbatore and the said Court, having appreciated the evidence placed on record, would ultimately decree the suit. It is only against the said judgment and decree of the first appellate Court, the first defendant in the suit has come forward to prefer the above second appeal on grounds such as (i) that the first appellate Court failed to appreciate that in view of Section 1 6(c) of the Specific Relief Act, it is mandatory for the plaintiff to allege and prove his continuous readiness and willingness to perform his part of the agreement from the date of the contract; (ii) that the first appellate Court failed to appreciate that the plaintiff has not even pleaded in the plaint that he is reedy and willing to perform his part of the contract and in the absence of pleading, the plaintiff cannot even let in evidence and the plaintiff realizing his omission to plead in the plaint, filed a petition for amendment to insert the plea of readiness and willingness to perform his part of the contract and the same was dismissed by the appellate Court and (iii) that the first appellate Court after dismissing the said petition for amendment, committed a grave illegality in stating that Section 16(c) of the Specific Relief Act has been complied with. This Court admitted the above second appeal for determination of the following substantial questions of law:

1.Whether or not the first appellate Court committed a grave illegality in not

dismissing the suit in the absence of any averment in the plaint that he was ready and willing to perform his part of the contract?
2.Whether or not the absence of an averment in the plaint that the plaintiff was ready and willing to perform his part of the contract amounts to failure to disclose a cause of action in regard to the relief for specific performance and as such the suit is liable to be dismissed?

3.Whether or not the finding of the first appellate Court contrary to the finding of the trial Court is not vitiated by its failure to consider the pleading and the evidence?

11. During arguments, the learned counsel appearing on behalf of the appellants besides bringing forth the facts of the case as pleaded on the part of the appellant and the respondent as well, the evidence placed on record and the decisions arrived at by the courts below, would lament against the first appellate Court having not given credence to the sentiments and legality of the trial Court in arriving at its conclusion to hold that the agreement was genuine but at the same time dismissing the suit on ground that since it was a mandatory obligation on the part of the first respondent/plaintiff to be ready and willing to perform his part of contract thus giving effect to Section 16(c) of the Specific Relief Act. At this juncture, the learned counsel would cite a judgment of the Honourable Apex Court rendered in MAJUNATH ANANDAPPA urf SHIVAPPA HANASI vs. TAMMANASA AND OTHERS reported in 2003 (2) CTC 109 wherein it has been held:

"Pleading regarding readiness and willingness is mandatory and that the Court should cull out readiness and willingness from reading all averments in plaint coupled with materials brought on record during trial only in exceptional cases."

12. The learned counsel for the appellants would also cite yet another judgment of the Division Bench of this Court rendered in ARUNACHALA MUDALIAR vs. JAYALAKSHMI AND ANOTHER reported in 2003 (1) CTC 355 wherein the Division Bench has laid emphasis on the point that the purchaser must always be ready and willing to perform his part of the contract.

13. On such arguments, the learned counsel would seek to allow the appeal setting aside the judgment and decree passed by the first appellate Court further restoring the trial Court's judgment.

14. On the part of the learned counsel appearing on behalf of the first respondent/plaintiff, he would dwell on facts without bringing forth any new fact or circumstance or law and hence it would be only a time consuming factor to repeat the arguments of the learned counsel for the first respondent/plaintiff.

15. In consideration of the facts pleaded, having regard to the materials placed on record and upon hearing the learned counsel for both, what comes to be known is that it is a suit for specific performance and for delivery of possession of the suit properties and the case of the plaintiff is that under Ex.A.1 agreement, the first defendant agreed to sell the suit

property in his favour for a sale consideration of Rs.5,000/= and on receipt of an advance amount of Rs.2,000/= further agreeing to execute the sale deed in favour of the first respondent/plaintiff within a period of ten months from the date of Ex.A.1 and in fact even in the grounds of second appeal, the appellant himself has averred that though initially the plaintiff has not pleaded his readiness and willingness to perform his part of contract, when he realised during the pendency of the suit, he effected necessary amendments into the plaint to the said effect and therefore the question of not pleading the readiness and willingness on the part of the plaintiff does not arise at all. Moreover, Courts have held, particularly the Apex Court in the judgment cited on the part of the appellant himself, that even in the absence of any specific pleading to that effect, in exceptional cases, the intentment of the party being ready and willing to perform, would be inferred on a careful perusal of the pleadings and therefore so far as the case in hand is concerned, this Court is of the view that the plaintiff has not committed default in his readiness and willingness to perform his part of the contract regarding Ex.A.1 agreement.

16. Further, it is relevant to point out here that though the law is that time is the essence of the contract, the Courts have held uniformly that time is not the essence of the contract so far as the contracts regarding immovable properties are concerned and therefore the plaintiff cannot be said to have committed the fault of not being ready or willing to perform his part of the contract regarding the time taken by him in the case.

17. Even the trial Court, which has found that Ex.A.1 document is a genuine agreement entered into, has concluded holding that the first respondent/plaintiff was not ready and willing to perform his part of the contract and has dismissed the suit. However, the first appellate Court, on valid and tangible reasons assigned, would find that the plaintiff was not slack in his readiness or willingness to perform his part of the contract as a result of which ultimate decision has been at on the part of the first appellate Court not only to allow the appeal preferred by the plaintiff but also to decree the suit as prayed for.

18. In answering the substantial questions of law, so far as the first and second substantial questions of law are concerned, they have been framed taking it for granted that on the part of the plaintiff, the readiness and willingness to perform his part of the contract has not been pleaded and while so, the first appellate Court has erroneously decreed the suit, both of which are not correct. As already brought forth, it is glaring from the grounds of appeal that the plaint has been amended to the effect of pleading the plaintiff's readiness and willingness and hence the question that `in the absence of pleading' does not arise at all. Moreover, the lower appellate Court only after coming to know that factually the readiness and willingness on the part of the plaintiff coming to be established, based on such foundation, has validly decreed the suit allowing the appeal, in which event, it cannot be held that the lower appellate Court has committed any illegality in its decision and hence these substantial questions of law have to be decided in favour of the respondent and against the appellant.

19. The third substantial question of law is concerned with considering the pleadings and evidence. The lower appellate Court has clearly considered the pleadings and the evidence as it comes to be seen on perusal of the judgment of the lower appellate Court and since the decision has been factually arrived at in due consideration of the pleadings and evidence, it can never be held that the judgment would become vitiated in law and therefore even under this substantial question of law, the appellant does not score any point and the same is decided only in the negative.

20. This Court is in perfect agreement not only with the decision arrived at by the first appellate Court in this case but also the manner in which the same has been arrived at and therefore the interference of this Court sought to be made into the well considered and merited judgment of the first appellate Court is neither necessary nor warranted in the circumstances of the case and hence the following judgment:

In result,
(i)the above second appeal is without merit and the same is dismissed.
(ii)The judgment and decree dated 30.9.1991 rendered in A.S.No.35 of 1990 by the Court of I Additional Subordinate Judge, Coimbatore thereby setting aside the judgment and decree dated 10.8.1989 rendered in O.S.No.878 of 1979 by the Court of I Additional District Munsif, Coimbatore is hereby confirmed.

However, in the circumstances of the case, there shall be no order as to costs.

Index: Yes
Internet: Yes
Rao
To
1. The I Additional
Subordinate Judge, Coimbatore

2. The I Additional District Munsif,
Coimbatore